

MEMORANDUM

State of Alaska

Department of Environmental Conservation
Division of Statewide Public Services

TO: Randy Bates
Project Analyst
Division of Governmental Coordination

DATE: February 28, 2001

FROM: Fran Roche
ACMP Coordinator
Department of Environmental Conservation

Subject: DEC Comments on proposed
6 AAC 50 regulations

In the past few months staff in four divisions of the Department of Environmental Conservation (DEC) reviewed, attended meetings and submitted written comments on the proposed 6 AAC 50 regulations. The Spill Preparedness and Response Division (SPAR), Environmental Health Division (EH), Division of Air and Water Quality (AWQ) and Statewide Public Services (SPS) Division commented on many aspects of the draft 6 AAC 50 regulations. Attached are the consolidated DEC comments from this effort.

The following list of priority issues are addressed in the department comments and reiterated here to summarize the department's key concerns. As the Division of Governmental Coordination works to revise the draft regulations in the next phase of this revision I look forward to working with you and the revision staff to resolve these issues. The page number following each issue refers to the attached DEC comment document.

1. The applicability of consistency review and the scope of review must be tied to the ABC list as described in Article 7. Page 1
2. A single section of the regulations should describe all aspects of the applicability of the ACMP. Page 1
3. The 5 day extension allowed in 6 AAC 50.280 (6) for resource agencies to consider public comments must be standard procedure when a DEC authorization is included in a consistency review. Page 7-8
4. An evaluation of a project against applicable enforceable policies required in 6 AAC 50.260 (g)(1) should not involve review tasks beyond current practice for DEC as the coordinating agency during a single agency review. Page 8
5. The term "review participant" as used in the draft 6 AAC 50 regulations should be examined in each instance to ensure that there is no increase or decrease in the standing or function of

Regional Citizens Advisory Councils from what current 6 AAC 50 regulations allow.

Page 10

6. Activities subject to Permit by Rule regulations should be included on the A list or Section II of the B list as applicable. Page 16
7. The threshold for project modifications to be subject to consistency review should be **significant additional impacts** rather than the currently proposed “will likely cause additional impacts”. Page 19
8. “Oil Spill Contingency Planning” should not be included in the definition of “activity”. If this authorization is retained in the definition then the federal OPA 90 Oil Spill Contingency plans should be added to the list of federally regulated activities subject to consistency at 6 AAC 50.405(6). Page 21
9. DEC encourages DGC to add the incorporation of the Clean Water Act and Clean Air Act as required in Title 15 of federal regulations 15 CFR 923.45 Air and Water Pollution Control Requirements into 6 AAC 50 regulations. Page 3
10. 6 AAC 50.750 (c) must be deleted to ensure that DEC authorizations not on the ABC or D list are not included in an individual project review. DEC feels that full consideration of the impact of permitted activities on coastal resources and uses should be accomplished during the ABCD list review not during an individual project review. Page 17
11. Consistent terms should be used throughout the proposed regulations to describe the applicability of the ACMP. Page 1

The Division of Governmental Coordination is commended for its effort to work with resource agencies throughout the revision to 6 AAC 50. Please feel free to contact me if you have questions or concerns regarding DEC’s comments.

Attachment

.cc Kurt Fredriksson DEC Deputy Commissioner

David Rogers ,AWQ

Lynn Kent, AWQ

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Department of Environmental Conservation
Comments on Title 6, Chapter 50 Alaska Coastal Mangement Program (ACMP)
Implementation
December 3, 2000 Draft

6 AAC 50.005 Applicability of the ACMP Consistency Review Process.

“(a) A project that [may] is likely to affect any coastal use or resource is subject to the consistency review process described in this chapter when any activity that is part of the project”

“(1) requires a resource agency authorization on the ABC list as identified in Article 7, 6 AAC 50 700-790.”

Comments

The “may” before affect should be deleted and revised to be consistent with the draft language in 6AAC 50.750(a).

Several sections of the proposed regulations set out requirements on the applicability of the consistency review process. All aspects of the applicability of the program should be stated in 50.005 including the reference to the list of activities not subject to consistency allowed in draft 6 AAC 50.750(d).

The ABC list is the agreement between DGC, DEC, DNR, DFG and the coastal districts that identifies State resource agency authorizations and how they must be reviewed for consistency. Proposed regulations in Article 7 fully identify a process and all regulatory allowances for management the ABC list. This is the forum that DGC and State resource agencies have utilized for many years to implement the applicability of the ACMP. The ABC list should continue to be the document that delineates resource agency authorizations that affect coastal resources and uses. Those authorizations that do not have coastal affects should appear on a “D” list as described in 6 AAC 50.750 (d). To ensure that the ABC list is a meaningful tool for the State and to provide certainty to review participants as to what authorizations are subject to the program, the applicability statement in .005 must reference the ABC list since that is the state agency agreement on applicability.

The draft regulations also expand the definition of activities that come under coastal zone review to include any type of decision or approval that a resource agency might make in the course of any projects related to the coastal zone.

On a daily basis, the Department makes many decisions that, if subject to ACMP review, would unnecessarily delay activities, increase the potential for environmental damage and lead to delays and increased expenses for both the department and the regulated community.

The definitions for “project”, “authorization” and other key words in the draft ACMP regulations should be tied to the “ABC list”. The regulations should make it clear that an activity that is listed on the “D” list as described in 6 AAC 50.750 (d) is not subject to ACMP consistency review. The question of whether an activity requires an ACMP review should be resolved in the process of revising the ABC list.

6 AAC 50.025 Scope of Project Subject to Consistency Review

“(a) The coordinating agency, in consultation with any resource agency that requires an authorization, shall determine the scope of the project subject to a consistency review.

(b) Except as provided under AS 46.40.094, the scope of the project subject to consistency review must include “

(1) each activity that requires a federal or state **resource** agency authorization **on the ABC list**
Article 7, 6 AAC 50.700-740;

(2) The use associated with an activity for which an authorization is required;

(3) [Any activity, regardless of whether it requires an authorization, without which the project, as proposed, could not be conducted;]

(4) A federal activity.

Comments

(b)-Subparagraph (b) sets out an exception under AS 46.40.094 but does not describe what happens when the scope of the project **is** governed by AS 46.40.094?

(1)-The word “resource” should be added to paragraph 1. The current statement in (1) requires every state authorization to be subject to consistency review which does not make sense when you consider the State has numerous agencies that issue authorizations such as Occupational licensing, Department of Transportation etc.. The bolded underlined “**on the ABC list...**” must be added to (1) to ensure that the scope of a project subject to consistency review is based on the list that resource agencies and coastal districts agree to. Project developers will also have certainty on how resource agency authorizations will be reviewed.

Paragraph (3) should be **deleted** since it broadens the scope of consistency reviews to activities not included within the authority of State or federal agencies. The outcome of this paragraph will expand the scope of consistency reviews to every activity in the coastal zone. If this requirement is retained coastal district policies potentially could be revised to follow this expansion with subjects such as fish and game allocation or local zoning requirements.

In addition, (3) “any activity, regardless of whether it requires an authorization, without which the project, as proposed could not be conducted” does not appear to be consistent with the applicability statement in 6 AAC 50.200. Draft 6 AAC 50.200 requires that “activities that will likely affect a coastal use or resource and that requires a resource agency authorization must be conducted in a manner consistent with the ACMP”

6 AAC 50.035 Division of Governmental Coordination (DGC) Responsibility

Comment

This section should contain a reference to statute AS 44.19.145 since it has specific provisions regarding DGC responsibility.

6 AAC 50.055 Coastal Resource District Responsibility

“(2)[may] shall include an alternative measure recommended in the districts consistency comments and identified in a final consistency determination issued under 50.265 in an authorization for the project that is issued under the coastal resource district’s Title 29

authority.”

Comment

(2)- The requirement to place alternative measures recommended by a district and included on a final determination on a Title 29 authorization should be mandatory.

ADD 6 AAC 50.065 Incorporation of the Clean Water Act and the Clean Air Act Requirements of the Clean Water Act (CWA) and Clean Air Act (CAA) as amended are incorporated into the ACMP as established by the State as the water pollution control and air pollution control requirements. 15 C.F.R. 923.45. A project found in conformance with the Alaska Department of Environmental Conservation air and water quality statutes and regulations, as administered by that agency, shall be deemed consistent with the ACMP with respect to those considerations.

Comment

To date, the Air, Land and Water Quality Standard at 6 AAC 80.140 has served as the State’s incorporation of the Clean Water Act and Clean Air Act required by federal regulations at 15 CFR 923.45. Since the state’s air and water pollution control authorities are administered solely by the Department of Environmental Conservation (DEC), the result of 6 AAC 80.140 has at best been an unnecessary duplication of regulatory review, and at worst a very confusing and contentious experience for project applicants, coastal districts and DEC. An explicit recognition of DEC’s pollution control authorities in 6AAC 50 would help to clarify that a permit issued to a project by DEC satisfies federal requirements for incorporation of the Clean Air Act and Clean Water Act.

6 AAC 50.205 Consistency Review Coordination

(c) A resource agency authorization may serve as the consistency determination for a project provided

- (1) the requirements of 6 AAC 50.500-.520 are met;
- (2) an opportunity for petition and elevation under 6 AAC 50.600-.680 is provided; and
- (3) the project is evaluated against the ACMP enforceable policies.

Comments

(c) (3)- allows resource agency authorizations to be the final consistency determination for a project if they contain all of the requirements in 50.260 (g). This means (g) (1) – (5) an evaluation of the project against enforceable policies, a brief explanation of the alternative measure, and the assignment of alternative measures on State authorizations would each need to appear on a permit. Research should be done on whether it is legal and/or practical to place this consistency information on State authorizations.

(c)(3) The requirement to evaluate the project against the ACMP enforceable policies also appears in 6AAC 50.260(g)(1). Please refer to the DEC comments under 50.260 (g)(1).

6 AAC 50.210 Coastal Project Questionnaire

(c) A CPQ is not required

(3) when a categorically consistent determination, general consistency determination or general concurrence specifically states a CPQ is not needed for the covered activity.

Comment

The situation where some activities require a CPQ and others do not is confusing. If a CPQ is not required then the scope of the project and whether it needs individual review is not known. Please refer to the DEC comments on 6 AAC 50.700.

6 AAC 50.216 Pre-Review Assistance

“(b) At the time an applicant requests pre-review assistance, the applicant shall provide the coordinating agency with a brief description of the proposed project and potential locations and, to the extent feasible, a completed coastal project questionnaire,[and] a map identifying the location of the project,” **adjacent facilities, designated environmentally sensitive areas, and any other man-made or natural features that need to be considered during the review of the project.**

“(d)(2) a resource agency that requires an authorization for an activity that is part of the proposed project may identify issues related to the authorization and potential mitigation, [requirements and, to the extent permitted by law, provide the applicant a preliminary assessment regarding whether the activity will comply with its statutory and regulatory authorities.]”

“(e) DGC and the resource agencies will attempt to inform a coastal resource district of a proposed project that may affect a coastal use or resource within the district. When a pre-review assistance meeting is scheduled, the coordinating agency shall invite a coastal program representative from any potentially affected coastal resource district to the meeting.”

Comment

(b)- The CPQ has sections that provide a brief description of the project and a project location section. It is duplicative to require a CPQ and a “brief description of the proposed project and potential locations” when these are part of the CPQ.

The underlined bolded words should be added to (b) to specify what project site details the applicant should provide the State at the time of Pre-review.

(d)(2)- This paragraph should end after the word mitigation on line 2. The requirement for a preliminary assessment of whether an activity will comply with statutes and regulations of the department at the time of a pre-review assistance **should be deleted**. This regulation requires a preliminary assessment prior to any departmental review of the proposed project. An applicants expectations will be raised by this regulation to a level DEC cannot meet. Most C listed DEC authorizations require engineering review and modeling that enable reviewers to determine consistency with statutes and regulations. At the pre – review stage not enough is known about the project to provide an assessment of whether it will comply with statutes and regulations.

(e) -This is a new requirement for State resource agencies to hold pre-application assistance meetings with participation of the coastal districts. It may be difficult to determine which of the contacts with an applicant constitute a meeting requiring an invitation to the local district.

6 AAC 50.220 Applicant Consistency Review Packet

(a) [Except as provided in (e) of this section,] T[t]he applicant shall submit a consistency review packet to the coordinating agency that includes

(1) a completed CPQ that includes

(A) a complete and detailed description of the proposed project;

(B) a certification that the proposed project complies with and will be conducted in a manner consistent with the ACMP; the certification shall state, “[The proposed project complies with the applicable enforceable policies of the ACMP and will be conducted in a manner consistent with the program]

The proposed project will comply with the applicable enforceable policies of the ACMP and will be conducted in a manner consistent with the program.

“(2) **Except as provided in (e) of this section** completed copies of all resource agency authorization applications required for the project.”

“(e) an applicant shall submit directly to the agency responsible for issuing an authorization, an application for a state authorization requiring information that must be held in confidence by law, and any fee associated with a state authorization. The agency shall delete the confidential information **and forward a copy to the coordinating agency to ensure** [from] **confidential information does not appear in** any copy of the application that is distributed for consistency review under this chapter.”

Comments

(B)-How will an applicant know that their “project complies with and will be conducted in a manner consistent with the ACMP” prior to the review? DGC should revise this certification per the following suggestion.

The proposed project will comply with the applicable enforceable policies of the ACMP and will be conducted in a manner consistent with the program.

(a)- Delete the clause “except as provided in (e) of this section.” from the introductory line and add it as a lead in for 220(a)(2). As written this implies that if an applicant has confidential information in one of the authorization applications, then the applicant does not need to submit a review packet. This revision would clarify the intent of (a) to allow confidential information to be removed from the review packet before distribution.

(e)-This subparagraph requires that applications with confidential information be submitted directly to the agency with the authorization. That agency is then required to delete the confidential information from copies of the applications being distributed for consistency. This regulation does not specify that the application with the confidential information removed should be sent to the coordinating agency to become part of the project packet. The addition of the bolded, underlined words in (e) above would clarify this situation.

6 AAC 50.225 Determination of Completeness and Notice to Applicant

“(3) the coordinating agency determines the packet is sufficient for continued processing even though additional information may be required subsequently.”

Comment

Delete subparagraph (3). The review clock is too short to accommodate an incomplete packet. It allows the review to commence even though the coordinating agency recognizes that more information may be required.

6 AAC 50.240 Initiation of a Consistency Review

“(a) When a project requires an authorization from two or more resource agencies, DGC shall, following receipt of a complete consistency review packet, obtain express concurrence from the authorizing agencies regarding a start date.....”

“(d) (1) furnish to the applicant and each review participant a copy of the consistency review packet and review schedule with a solicitation for reviewer’s comments;”

“(2) furnish a copy of the consistency review packet to a person interested in the project [or] and”

“(d)(3) make a copy of the consistency review packet available for public inspection and copying at a public place” (B) “in an area outside a coastal resource district that the project may affect.”

Comment

(a) - Add the word “express” before concurrence to ensure the authorizing agency actually conveys the preferred start date for a project review rather than the coordinating agency presuming a start date if an agency permitter is unavailable.

(d) (1)-Why should the coordinating agency need to “furnish to the applicant ... a copy of the consistency review packet”? Since the applicant prepared the review packet why do we need to send it back to them? The applicant should receive the review schedule with the solicitation for reviewers’ comments.

(2) -The “or ” at the end of (2) should be replaced with a “and” to ensure that the coordinating agency sends a copy to interested people and makes it available for public inspection at a public place.

(d)(3)(B)-How is an “area outside a coastal resource district that the project may affect” determined? This subparagraph could apply to inland areas outside the coastal zone since they are outside a coastal resource district and may be affected. This requirement needs to be more specific or guidance given to assist in determining where these areas are? Is making the packet available on the internet and through the mail on request sufficient to comply with this section?

6 AAC 50.245 Request for Additional Information

“(d) The applicant shall provide the requested information to the requestor and a copy to the coordinating agency and all other review participants.”

Comment

The addition of “all” ensures each review participant will be included in the distribution of the requested information.

6 AAC 50.255 Review Participant Comment

“(a) A comment submitted by a review participant shall

(1) be in writing;

(2) cite applicable enforceable policies and explain why the commentor

believes the project is consistent or inconsistent with applicable enforceable policies within the commentor's area of expertise,;

“(4) (b) When a resource agency is reviewing an authorization application for a project undergoing a consistency review the agency shall identify in its consistency review comment any condition necessary to ensure the project is consistent with the ACMP.”

Comment

(2)-Add underlined bolded words under (2) to ensure the policies are cited in the comments.

DEC assumes paragraph (4)(b) will apply to the conditions that appear on this departments authorizations that “ensure a project meets DEC statutory and regulatory requirements and is consistent with the ACMP”. Since paragraph (b) requires DEC conditions at the comment due date the department will consider these conditions to be draft, until public and agency comments are considered and negotiations with the applicant result in final conditions as they will appear in the final consistency determination.

The preparation of DEC conditions will require the deadline extension at 6 AAC 50.280(a)(6) in order for permittees to adjust agency conditions to accommodate the comments from the review participants and the public before the final consistency determination. This time extension is **absolutely essential** for DEC to fulfill its responsibility to read, fairly consider and respond to review participant and public comments.

Draft conditions need to be negotiated with the permit applicant and affected parties even after the extended comment period ends. After the comment period permittees discuss all the options with affected parties so an agreement on final conditions can be reached. Final conditions from DEC (due to incorporation at 6 AAC 80.140) will be available for inclusion in the final determination.

6 AAC 50.260 Development of a Proposed Consistency Determination

“(g) In addition to the requirements in (f) of this section, when the state determines a project is consistent with the ACMP, the proposed consistency determination must

(1) include an evaluation of the project against applicable enforceable policies.

(i)The coordinating agency may [immediately] issue a final consistency determination if the review participants and applicant, concur with the proposed consistency determination and all alternative measures necessary to ensure consistency, and no citizen eligible to petition under 6 AAC 50.620 submitted timely comments”

Comments

(g) (1)- Current DEC ACMP review procedures during a single agency review include distribution of a project packet to review participants, giving due deference per the ACMP definition and fair consideration of comments. A proposed determination is developed that represents a consensus of the review participant consistency recommendations. The required evaluation in 50.260(g)(1) should not expand or change these current review procedures.

(i) - Delete the word “immediately” from the allowance to issue a final if the review participants and applicant concur on a proposed. The regulation will continue to allow an early final but will not convey that the coordinating agency will issue a final immediately.

6 AAC 50.265 Final Consistency Determination

- (a) “The final consistency determination shall meet the requirements of 6 AAC 50.260(f)(1)-(3) and (g) or (h) as appropriate, and include any changes made between the proposed and final determination”

Comments

(a)—The reiteration of all the requirements of the proposed consistency determination finding appears redundant. The coordinating agency should be allowed to describe only changes from the proposed (if any), rather than meeting the requirements of 260(f) and (g) or (h), or at a minimum have the **discretion** to provide all the requirements if the final is substantially different from the proposed.

6AAC 50.260 should allow for a revised proposed if the changes to the first proposed necessitate additional review by review participants.

6 AAC 50.270 Time for Issuance of a Final Consistency Determination

“(b)(1) five days after all the review participants receive the proposed consistency determination when the coordinating agency does not receive a timely request for elevation or a notice of petition.”

Comment

Please add the word “all” before “review participants” in order to specify that the receipt date is for all review participants.

6 AAC50.275 Resource Agency Project Authorization

“(b) An alternative measure developed during a consistency review that is within a resource agency’s area of expertise shall be implemented through the agency authorization for the project. An alternative measure not clearly under any agency’s expertise shall be implemented through one or all resource agency authorizations required for a project.”

“(d) Following issuance of a final consistency determination, a resource agency [may not] **shall not** include an additional alternative measure on its authorization.”

“(f) When there is an administrative appeal of an authorization for an activity that is part of a project, the deciding agency [may not] **shall not** modify an alternative measure included on the resource agency authorization.”

“(g) When there is an administrative appeal or additional review under an agency’s statutory or regulatory authority, a resource agency may modify a condition identified in the final consistency determination if the deciding agency finds the project will remain consistent with the ACMP.”

Comment

(b) -To assign alternative measures not within the expertise of any one agency to all permits for a project creates a monitoring and compliance problem. Each agency monitoring a project permit will require compliance on the same alternative measure. This potentially could result in multiple agency compliance

actions for the same alternative measure violation. Also, in a single agency review where there is multiple Department authorizations it does not make sense to list an alternative measure on each DEC permit. It is critical that an alternative measure be listed on some state authorization yet this regulation requires that alternative measures be assigned to all authorizations. The addition of the word “one” in bold and underlined allows the coordinating agency to choose a more reasonable and efficient single listing of an alternative measure if the coordinating agency ensures that the alternative measure will be implemented through a State authorization.

(d) and (f)—The term “shall not” appears in .275 (a) but “may not” is used in (d) and (f). In (d) and (f) the term “shall not” should be used instead of “may not.” As written, these paragraphs appear to provide discretion to, or not to include additional alternative measures on the authorization. If the intent is for the resource agency not to add additional alternative measures after final consistency review, then the regulation does not meet that intent. For (f), provide an exception citation for project modifications, provided for under Article 8.

(f)- (g)

Also in (f), the term “deciding agency” is confusing. The term “authorizing agency” is clear and has been the recognized term for the permitting agency in recent years.

(g) -As proposed this requirement is unclear. DEC reviewers felt the phrase “additional review” under an agency’s statutory or regulatory authority” needs to be clarified. DEC authorities are incorporated into the ACMP at 6 AAC 80.140 so it is unclear whether there is “additional review”. In addition the “deciding agency” should be changed to “authorizing agency”.

6 AAC 50.280 Consistency Review Schedule Modification and Termination

“(a) The coordinating agency may modify the consistency review schedule under the following circumstances and for the time specified:

(5) the coordinating agency may modify the review schedule by up to 5 days for a [review participant] **resource agency or coastal district** to consider timely submitted public comments,”

(9) the coordinating agency may modify the review schedule as necessary following distribution of the proposed consistency determination to assure the applicant, **resource agencies and coastal districts** receive the determination”

Comments

5) – This regulation is new to consistency reviews and represents a new allowance for review participants. Changing this to “resource agency or coastal district” allows those entities responsible for considering public comment time to do that task.

The standing and allowances for review participants in a consistency review should remain the same as current ACMP regulations. Regional Citizen Advisory Councils (RCAC) are considered a review participant when an Oil Discharge Contingency Plan is under ACMP review. The Department advocates maintaining the RCAC’s current status in ACMP reviews.

6 AAC 50.395 Process for Federal Negative Determinations

“(3) (c) Upon receipt of a complete negative determination, DGC shall solicit comments regarding concurrence or objection to the negative determination from each resource agency and any potentially affected coastal resource district. DGC shall establish the deadline for receipt of comment as appropriate based on the scope and complexity of the activity. A comment may be written or verbal. **Verbal comments must be followed up in writing within 5 working days.**”

Comment

Verbal comments are not accepted in other areas of the regulations. Why are verbal comments accepted for federal negative determinations? At a minimum a verbal comment should be followed up with a written comment.

6 AAC 50.405 Federally Regulated Activities Subject to Consistency Review

“(a)(5)(c) Environmental Protection Agency (C) permit for new sources or for modification of existing sources and waivers of compliance allowing extensions of time to meet air quality standards under Section 112(c)(1) of the 1972 Clean Air Act;”

(E) in conjunction with the Alaska Department of Environmental Conservation, joint permit under Resource Conservation and Recovery Act of 1978;”

(6) Department of the Interior

(a)(6)(B) Bureau of Land Management and Minerals Management Service permit for pipeline rights-of-way on public lands and the Outer Continental Shelf. **OPA 90 Oil Discharge Contingency Plans.**

(a)(6)(D) Minerals management service permit and license required for drilling and mining on Outer Continental Shelf lands. **Outer Continental Shelf Air permit, OPA 90 Oil Discharge Contingency Plans.**

(8) Department of Transportation United States Coast Guard permit for
(c) OPA 90 Oil Discharge Contingency Plans

Comment

(a)(5)(C)—Is this where OCS Clean Air Act Permits and Air Permits issued for Indian Reservations (Metlakatla) should be listed? Clean Air Act citations should be added similar to that provided for waivers (112(c)(1)).

(a)(5)(E)—The Department no longer issues joint permits under RCRA w/ EPA.

(a)(6)(D)- The Outer Continental Shelf Air permit should be listed here with the following agencies Bureau of Land Management, Mineral Management Service, and Environmental Protection Agency.

The definition of “activity” under proposed 50.990 includes “oil spill contingency planning”. DEC does not believe oil spill contingency planning should be considered an activity since

planning is not an activity that allows discharges to occur. DEC advocates that “oil spill contingency planning” be deleted from the definition of activity.

If the definition of “activity” in .990 retains “oil spill contingency planning” then the federal OPA 90 Discharge Contingency plans would fall into this definition and should be added to the federally regulated activities subject to consistency review. These OPA 90 Oil Discharge Contingency plans will need to appear under the Department of the Interior, Bureau of Land Management, Minerals Management Service and the Department of Transportation, United States Coast Guard.

6 AAC 50.425 Consistency Certification

“(c) To be complete, a consistency certification must include a completed coastal project questionnaire which includes

(5)Except as provided for in (e), a copy of any necessary resource agency authorization application; the application must meet the authorizing agency’s statutory and regulatory requirements for completeness; and

ADD (7) The applicant is required to provide sufficient copies of material that are not easily reproduced to DGC for distribution

“(e) An applicant shall submit directly to the agency responsible for issuing an authorization, an application for a federal or state authorization requiring information that must be held in confidence by law, and any fee associated with the authorization. The agency shall delete the confidential information **and forward a copy to the coordinating agency to ensure** [from] **confidential information does not appear in** any copy of the application that is distributed for consistency review under this chapter.”

Comments

(c)(5)—In order to be consistent with state resource agency authorizations and confidentiality in authorization applications, this subparagraph should lead in with “**Except as provided for in (e)...**”

Add (7) under what an applicant must include with a CPQ.

(7)The applicant is required to provide sufficient copies of materials that are not easily reproduced to DGC for distribution.

(e)—This paragraph requires that applications with confidential information be submitted directly to the agency with the authorization. That agency is then required to delete the confidential information from copies of the applications being distributed for consistency. This regulation does not specify that the application without confidential information should be sent to the coordinating agency to become part of the project packet. Please add a provision for the authorizing agency to provide the version of the application without confidential information back to the coordinating agency to include in the project packet.

6 AAC 50.445 Request for Additional Information for a Consistency Certification

By Day 25 of the coordinated consistency review, a review participant shall provide DGC with any request for additional information necessary to determine whether the requestor concurs or

objects to the consistency certification. Following a request for additional information

(1) DGC shall submit the request for additional information to the applicant;

(2) unless otherwise agreed to by DGC and the applicant, the applicant shall provide the requested information to DGC. **The applicant shall provide sufficient copies of review material to DGC for distribution to all review participants.**

Comment

The SPAR division advises that DGC add the underlined bolded words to require applicants to provide review materials since they are frequently difficult to reproduce.

6AAC 50.465 Review Participant Comments Regarding a Consistency Certification

“(3)describe any alternative measure that, if adopted by the federal agency, would permit the proposed activity to be conducted in a manner consistent to the maximum extent practicable with the ACMP.”

Comment

Why is a Federal agency asked to adopt alternative measures to permit an activity to be conducted in a manner consistent to the maximum extent practicable with the ACMP and no mention is made of adoption of state agency conditions?

6 AAC 50.475 Proposed Consistency Response to a Consistency Certification

“(d) In addition to the requirements in (c) of this section, when the state concurs with the consistency certification that a proposed project is consistent with the ACMP the proposed consistency response must include an evaluation of the project against applicable enforceable policies sufficient to support the consistent finding.”

Comment

(d)—The proposed consistency response to a federal consistency certification should mirror all the contents of the proposed determination under the state review process at 6 AAC 50.260(g) (1)-(5) regarding alternative measures and conditions for those projects that require both state and federal authorizations.

6 AAC 50.495 Review Process for OCS Exploration, Development and Production Activities

“(a)In accordance with 15 C.F.R. 930.70-.85, as amended, federally regulated activities described in detail in an OCS plan for exploration, or development and production from OCS leased lands, and that affect any coastal use or resource, are required to be conducted in a manner consistent with the ACMP.”

“(b) The consistency review for an OCS exploration, or development and production activity shall be conducted in accordance with the requirements of 15 C.F.R. 930.70-.85, as amended, and 6 AAC 50.415-.490. When a federal requirement conflicts with an ACMP requirement, the federal requirement is controlling.”

Comments

(a)-It is unclear how the U.S. Environmental Protection Agency’s OCS permitting provisions under the Clean Air Act are subject to this OCS exploration, development and production

activity section.

(b) -When a federal requirement conflicts with an ACMP requirement, the ACMP (or “the more stringent”) requirement should be controlling. This regulation should not conflict with State of Alaska Oil Discharge Prevention and Contingency Planning authority, which is more stringent than the federal standards (esp. Minerals Management Service).

6 AAC 50.520 Public Hearings

“(2)by written notice to the governing body of an affected coastal resource district **and resource agencies**; and”

Comment

Add the bolded underlined words so that the resource agencies are also aware of a DGC decision to hold a public hearing.

6 AAC 50.610 Elevation Process

“(a) When a resource agency, project applicant, or affected coastal resource district does not concur with the proposed consistency determination or response, it may request an elevation of the proposed consistency determination or response by the resource agency directors.

(b) An elevation is limited to consideration of

(1) the **proposed** consistency determination or response regarding whether the project is consistent;”

Comment

The proposed consistency determination is considered during an elevation. The term “consistency determination” in .610 should reflect that it is not the final but the **proposed** that is considered during an elevation.

6 AAC 50.640 Preparation for a Petition Hearing on a Proposed Consistency Determination or Response

“(a) When a petition is accepted, a coordinating agency [other than DGC] shall, within 10 days after receiving the petition document

(1) prepare an evaluation that identifies or explains the steps the coordinating agency took to fairly consider the petitioner’s comments

(3) provide DGC with”

Comment

(b) -Delete “other than DGC” in (a). DGC should be bound by the same petition preparation steps as that of a coordinating agency other than DGC.

(3)- DGC should also be required to do A and B of this section so the lead in “provide DGC with” should be deleted.

6 AAC 50.630 Acceptance or Rejection of a Petition

“(c) When a notice of petition or notice of intent is accepted, within [one] **two** days after acceptance, a coordinating agency”

Comment

Two days to accept a petition would be more reasonable than one day. Consideration of the history of the timeliness of the petitioners comments and all the other elements of acceptance may take longer than a single day.

6 AAC 50.670 General Hearing Procedures on Petitions

“(d) The council will convene a hearing to consider a petition on program implementation during the next scheduled council meeting or within 60 days, unless all parties to the hearing agree to a reasonable time extension. In a hearing held on a petition on program implementation

(1) the burden of proof is on the petitioner;

(2) the council will allow admission of material evidence of the type on which a reasonable person might rely in the conduct of serious business affairs;”

Comment

(d)(2)- The material evidence requirement is a legal phrase not commonly used. What does “in the conduct of serious business affairs” mean? This seems inappropriate for the types of evidence admissible by the council regarding coastal resources.

6 AAC 50.700 Use of General [and] *Permit by Rule*, Nationwide Permits, Categorically Consistent Determinations, General Consistency Determinations, and General Concurrences in Project Consistency Reviews

“(a) When an activity that is part of a project is authorized by a general or nationwide permit **or a permit by rule** that was previously evaluated and found consistent with the ACMP, the activity subject to the general or nationwide permit **or permit by rule** is consistent based on implementation of the general or nationwide permit **or permit by rule.**”

“(b) When a project includes both an activity that requires an individual consistency review and an activity that is subject to a categorical or general consistency determination or general concurrence under this article, all activities shall be included in the scope of a project subject to review except as permitted under (d) of this section.”

Comments

(a)-There is confusion regarding categorically consistent, general consistency, or general concurrence activities when they are within the scope of a project requiring individual consistency review. Some Categorically Consistent activities, and a few Generally Consistent, or General Concurrence activities do not need to submit a CPQ. When a resource agency receives an application without a CPQ they will be unaware whether these activities are part of a greater project. Subparagraph 700(d) should be clarified to state that those types of authorization approvals that do not require a CPQ would not be drawn into an individual consistency review under 700(b). Or some clear delineation of what type of projects do not require a CPQ should be made in these regulations.

Under 6 AAC 50.710, only Categorically Consistent projects not General Consistency or General Concurrence activities are defined as an “activity that requires a resource agency authorization and that has

minimal impact on coastal uses and resources”. Is subparagraph (b) intended to apply to those categorically consistent projects that are temporary and have “minimal impacts” and to “routine” activities as described in general concurrence or general consistency authorizations in 730(a.)?

A revision to the title of 50.700 and the first paragraph needs to accommodate recent permit streamlining work that has occurred for water discharge permits, and air quality permits. A Water Permit Redesign Work Group was established after budget cuts eliminated the water permits program in July 1999. Several tools have been developed to streamline the issuance of permits based on risk to the environment. Once fully developed, it is anticipated that these “Permits by Rule” will undergo public participation and ACMP review.

The Permit by Rule is similar to a General Permit or nationwide permit, but is not identical. Because of the similarities, it would be most suitable to list them either along with the GPs and nationwide permits in subsection (a) or for some minimal impact activities Permit by Rule should be eligible for the “A” list. Once authorized, these permits will, by reference, become a part of 6 AAC 80.140, and will be incorporated into the ACMP standards.

6 AAC 50.730 Review Process for General Consistency Determinations for Activities that Require a Resource Agency Authorization

“(a) DGC may issue a general consistency determination for a routine activity that requires a resource agency authorization and that can be made consistent with the ACMP through application of standard measures.”

“(b) DGC shall develop and maintain a list of general consistency determinations (the “B” list).”

“(c)(3) describe the standard measures necessary to ensure the activity is consistent with the ACMP.”

Comment

(a)- The term “routine activity” as a prerequisite for an activity to be listed as a general consistency determination on Section I of the B list has been debated in the ACMP Working Group for a number of years. A definition of “routine” needs to be included in the definition section to ensure the resource agencies and DGC agree on its meaning.

(b)-This subparagraph identifies “the B list” but these authorizations are more specifically on Section I of the “B” list. There is considerable confusion regarding Section I and Section II of the “B” list. Since they are distinct lists with entirely different review procedures DGC should consider renaming Section I and Section II. At a minimum the regulations should state what is on Section I and Section II.

(c)(3) - A definition of the term “standard measures” is needed since it is similar to but not the same as the defined term “alternative measures.”

6 AAC 50.740 Implementation of General Consistency Determinations for Activities that Require a Resource Agency Authorization

“(a) An applicant for an activity on **Section I of** the B list shall submit a completed CPQ to the authorizing resource agency unless a general consistency determination specifically states a CPQ is not needed.”

Comments

See comments above for 6 AAC 50.700. Without a CPQ it is difficult to establish project scope for other authorizations. Based on the proposed language, it appears that no further consistency review is required unless a CPQ is required. In order for the general consistency determination to be exempt from project review in 6 AAC 50.700 the project needs to be temporary and have minimal effects on coastal resources. Could it be stated in these regulations that those authorizations that do not require a CPQ need to be both temporary and have minimal effects on coastal resources”?

This regulation identifies General Consistency Determinations as an activity on the B list. **Section I** should be added to specify that these activities fall on that list rather than Section II since they are entirely different lists with different review procedures.

6 AAC 50.750 Activities Generally Subject to Individual Consistency Review

“(c) An activity requiring a resource agency authorization that is not identified on the C list may be subject to consistency review if the activity may affect any coastal use or resource.

(d) DGC, in consultation with the state resource agencies, may develop and maintain a list of authorizations that are not subject to an individual consistency review.”

Comments

(c)- This subparagraph should be deleted. DEC objects to this requirement to allow resource agency authorizations not on the C list that “may affect any coastal use or resource” to be subject to an individual consistency review. DEC has many authorizations that do not appear on the C list. To allow an authorization that has not had agency and coastal district review to be included in an individual review by DGC undermines the statewide ABC list review process. At the outset of an ABC list revision DGC asks for amendments or modifications to the list. This is the time when the ACMP working group, coastal districts and the public can propose changes to the C listed authorizations. Individually reviewing a DEC authorization not listed on the C list is ineffective and could cause affects to coastal resources and uses, for example, by delaying a cleanup. Applicants should also be able to rely on ABC lists to predict review timeframes and review requirements.

(d)-The allowance in (d) for a list of authorizations that are not subject to consistency review is very important to DEC. This list is already being referred to as the D list. These regulations should formally recognize this list as the D list in order to prevent future confusion over this title. The department looks forward to working with ACMP review participants and DGC to create this list of authorizations not subject to consistency review.

6 AAC 50.760 Review Process for Resource Agency General Permits

Comment

This section does not identify where General Permits are listed. Section II of the B list should be added to (c) The resource agency shall provide DGC with a copy of the final approved general permit **to be included on Section II of the B list.**

6 AAC 50.790 General Concurrences for Federally Regulated Activities

“(b) An activity that is consistent based on a general concurrence **for a minor federally regulated activity** shall not be subject to further consistency review.”

Comment

(b) Add the bolded underlined words to ensure that this regulation clearly applies to minor federally regulated activity.

6 AAC 50.800 Project Modifications During a Consistency Review

“A coordinating agency may terminate a consistency review if, after initiation of the consistency review,

(1) information is received by the coordinating agency that indicates an additional authorization is required; or

(2) the description of the project is substantially modified by the applicant.”

ADD (3)for a single project the applicant submits multiple CPQ’s listing inconsistent information

Comments

Add a new section 6 AAC 50.800(3) **For a single project, the applicant submits multiple CPQs listing inconsistent information.** This has been problematic with both single agency reviews and DGC coordinated reviews. For example, an applicant submits one CPQ for the Air Permits Program and another CPQ for the Spill Preparedness and Response Division regarding oil spill contingency plans. Each CPQ lists a requirement for only the applicable activity authorization. Another example is that an applicant will submit a CPQ for a coordinated review to DGC and submit a separate CPQ for air permitting. The coordinated review CPQ will not reference the air permit authorization, and the air permitting CPQ will not reference authorizations other than the air permit. This proposed requirement would stop and re-initiate review if the applicant has provided inconsistent information in multiple CPQs for a given project.

6 AAC 50.810 Project Modifications After Issuance of a Final Consistency Determination[s]

“(a) An applicant that proposes a modification to an activity that **will cause significant additional impacts and** is part of a project for which a final consistency determination or response has been issued shall submit a new CPQ that includes a detailed description of the proposed modification. The CPQ for the proposed modification must be submitted to the agency that coordinated the consistency review of the project.”

“(b) A modification that is proposed to a project for which a final consistency determination or response has been issued shall be subject to a consistency review when the proposed modification will [likely] cause **significant additional impacts to coastal uses or resources and**”

(2)when a modification requires a new authorization from two or more resource agencies **that will cause significant additional impacts to coastal uses or resources;**

“(e) DGC shall coordinate the consistency review for a proposed modification

(5) the resource agency whose authorization requires modification requests that DGC coordinate

the review, [provided DGC agrees];”

“(i) The following modifications, that have no effect on coastal uses and resources, are not subject to further consistency review:”

“(5) authorization modifications that are consistent with [allowed under] the original authorization conditions”

Comments

The majority of water permits issued by DEC are modifications or renewals. Changes to the permit language is made in all of them to provide clarification, change monitoring or other requirements, or to update the format and language to current standards. These facilities have previously been found consistent, are usually discharging the same type and amount of effluent, have been monitoring their effluent, do not require a new public notice, and are not having significant impacts on the environment. They do not need to go through another consistency determination. This modification section should require a consistency review for those new applications, modifications, or renewals only where there is a significant change or impact to the environment enough to require a new public notice

(a)-Add the bolded underlined words to change the threshold for a new review to significant additional impacts (a) An applicant that proposes a modification to an activity that will **cause significant additional impacts and** is part of a project for which a final consistency determination or response has been issued.....” Additionally, the current CPQ will need a major revision to accommodate the modification process and the information needs specified in this regulation.

(b)-Change (b) to say ...when the proposed modification will [likely] cause **significant** additional impacts to coastal uses or resources and...

(2) - Suggested rewrite (b)(2) a change to an existing resource agency or federal authorization is required **that will cause significant additional impacts to coastal uses or resources.**

(e)(5)—Remove the provision “...provided DGC agrees.”

(i) - replace “no effect” with “insignificant effect”

(i)(5) - authorization modifications that are consistent with the original authorization conditions. This would allow permit language to be modified for clarification without going through another consistency determination.

6 AAC 50.820 Authorization Renewals

“(a) When an authorization for a project is subject to renewal and no significant modification to the project is proposed, no further action under this chapter is necessary.”

“(b) When an authorization for a project is subject to renewal and a modification to the existing project is also proposed, the renewal and proposed modification shall be subject to the provisions of 6 AAC 50.810.”

Comment

(a)- Add the bolded underlined “significant” to identify the threshold for modification review. “When an authorization for a project is subject to renewal and no significant modification to the project is proposed...”

(b) – Add the bolded underlined “significant” to identify a threshold for modification review. When an authorization for a project is subject to renewal and a significant modification to the existing project is also proposed...

6 AAC 50.830 Authorization Expiration

“**Except as provided for in 6 AAC 50.820**, [W]hen an authorization has expired and a new authorization is sought, the activity is subject to the new authorization shall be considered a new activity subject to a consistency review **unless there is a pending renewal, administrative extension or other process initiated to reauthorize the project.**”

Lead in with “**Except as provided for in 6 AAC 50.820**, when an authorization has expired...” Often, the Resource agency has received a request for renewal, and the existing authorization has lapsed. When a resource agency receives a timely request for renewal 50.830 should not be required.

6 AAC 50.920 Emergency Expedited Review and Waiver of Review

“(a) When an applicant needs an expedited consistency review or waiver of consistency review due to an emergency as described in AS 26.23 or AS 46.04.080, other applicable law, or when the coordinating agency finds that an expedited or waiver of review is necessary for the preservation of the public peace, health, safety, or general welfare, the coordinating agency, in consultation with the resource agencies and any affected coastal resource district, may [modify] **expedite** or waive the review process established in this chapter as necessary to meet the emergency. The decision to [modify] **expedite** or waive the review shall be based upon clear and convincing evidence of a need for the [modification] **expedited review** or waiver.

(b) When an expedited review is determined necessary in accordance with (a) of this section, the coordinating agency shall document the decision in writing. The coordinating agency shall **expedite** [modify] the consistency review process as necessary to meet the emergency and, as soon as practicable, shall issue a final consistency determination in accordance with 6 AAC 50.265, that describes the [modified] review process.”

Comment

Replace the terms “modify” and “modification” with “expedite” and “expedited review.” Use consistent terms when referring to the expedited review process in this section, as Section 6 AAC 50.810 refers to project modifications.

6 AAC 50.990, Definitions

(2) “activity” means a land or water use, identified on the ABC list and in federal applicability lists, that may affect any coastal use or resource, including construction, reconstruction, or demolition of any structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; primary or secondary manufacturing [discharge of air pollutants]; aquatic farming; timber harvest operations; log transfer facilities; oil and gas exploration and

development; or cause pollution [and oil spill contingency planning];

(8) "authorization" means any permit, license, authorization, certification, approval or other form of permission that a resource agency is empowered to issue to an applicant **identified on the ABC list**; an authorization is a federal permit or license and has the meaning given in 15 CFR 930, as amended:

Comment

It is not clear why these specific activities are identified when a wide range of activities may affect any coastal use or resource. The Air and Water Division advised that "primary and secondary manufacturing" should be added to the definition. The discharge of air pollutants appears in the definition but water pollution is not identified. The definition should be modified to reflect the States statutory use of the term "pollution" over the use of "pollutants." "Air pollution" and "pollution" are defined in DEC's statutes (AS 46.03.900) (2) and (19). As suggested above the definition could be modified to say "**or cause pollution**"

"Oil spill contingency planning" should be deleted from the definition of "activity". As proposed the oil spill contingency planning inclusion in this definition would mean the State's response plan and all area plans will be subject to consistency review. Planning is not an activity that allows discharges to occur so no affects to coastal resources and uses result from this type of planning. As proposed the inclusion of oil spill contingency planning in this definition would mean the State's response plan and all area plans are subject to consistency review. This definition of "activity" combines "planning" activities that do not impact the resources of the coastal zone with the other "discharge" permits that will affect coastal resources or uses.

Does this broad definition mean that every project in the State must go through consistency review because it may affect coastal uses and resources?

DEC encourages narrowing the term "activity" by tying it to State and federal authorizations listed on the ABC list and all federal authorizations as they appear in federal applicability lists.

(25) "due deference" means that deference that is appropriate in the context of the commentor's expertise and area of responsibility, and all the evidence available to support any factual assertions; a coastal resource district whose district program has been incorporated into the ACMP is considered to have expertise in the interpretation and application of its program; **a resource agency is considered to have expertise in the interpretation and application of its regulations, statutes and procedures.**

Comment

The deference given to a coastal resource district is specified in this regulatory definition. An equal explanation of the deference given to resource agencies should appear in this definition.

Suggested additions to the definition section

A definition of standard measures as required in 6 AAC 50.730, the "B" list.

A definition is needed for “significant additional impacts to coastal uses or resources” per DEC comments on 6 AAC 50.810 (b). This definition should not include minor modifications to permits, clarification of permit language, changes to monitoring requirements, or other administrative modifications that do not have significant impacts to the environment.

The term “routine activities” appears in draft 6 AAC 50.730. There needs to be a common understanding of “routine activity” in order for the revision to Section I of the B list can move forward. A suggestion for elements to include in a definition follows.

“Routine activity” means a common activity with well understood affects that can be managed with standard measures in order to mitigate impacts to coastal uses or resources.